



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

June 29, 2022

Re: FOIA Request NLRB-2022-001230

Dear Mr. J. David Sackman (Reich Adell and Cvitan):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on May 23, 2022, in which you seek all executed affidavits (along with any exhibits attached), all evidence, and position statements submitted by the parties in *Chevron Products Company (a division of Chevron U.S.A. Inc.)*, Case No. 31-CA-273302. You assumed financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on May 23, 2022. We have confirmed that you are requesting records or information in a case where your firm represents the charging party (the union).

In an email communication to a member of the FOIA staff on June 10, 2022, you narrowed your request to all evidence and position statements submitted by the charged party (Employer) and/or its legal representative. You also stated you had affidavits of three named individuals and seek affidavits submitted by any other person.

Your request is granted in part and denied in part, as explained below.

A search of the Agency's electronic casehandling system, NxGen, has been conducted. Your request for documentary evidence and position statements, submitted by the parties, is granted and the responsive records are attached (34 pages).

After a review, I have determined that portions of the attached records are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). Specifically, redactions have been made to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which protects personally identifiable information, the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the

release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C). Please note that one or more pages of the records being released have a solid black box obscuring the text underneath. These markings were in the original records and were not made by this office pursuant to the FOIA. Redactions made by the FOIA Branch appear as black boxes with a white overlay text stating the applicable FOIA exemption(s).

The portion of your request seeking affidavits is denied. Affidavits obtained by the Regional Office during the investigation of a case are records protected from disclosure in full under FOIA Exemptions 6, 7(C), and 7(D), 5 U.S.C. § 552(b)(6) and (b)(7)(C) and (b)(7)(D).

An individual's status as a union supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). See, e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." See *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir. 1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995);

United Technologies, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the requested case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

One hour of professional time was expended in reviewing for release the requested material. Accordingly, please remit \$37.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Teresita Sanabria, the FOIA Specialist, who processed your request, at (202) 273-4000 or by email at Teresita.Sanabria@nrlb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor

Washington, D.C. 20570

Email: FOIAPublicLiaison@nrlb.gov

Telephone: (202) 273-0902

Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services

National Archives and Records Administration

8601 Adelphi Road-OGIS

College Park, Maryland 20740-6001

Email: ogis@nara.gov

Telephone: (202) 741-5770

Toll free: (877) 684-6448

Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt

Chief FOIA Officer

National Labor Relations Board

1015 Half Street, S.E., 4th Floor

Washington, D.C. 20570

Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop

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the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling
FOIA Officer

Attachment: 34 pages